

**BRITISH COLUMBIA LABOUR RELATIONS BOARD**

COCA-COLA BOTTLING LTD.

("Coca-Cola")

-and-

TEAMSTERS LOCAL UNION NO. 213

(the "Teamsters")

-and-

B.C. FEDERATION OF LABOUR

(the "Federation")

-and-

UNITED STEELWORKERS OF AMERICA

(the "Steelworkers")

-and-

UNITED FOOD AND COMMERCIAL WORKERS UNION, LOCAL 1518

(the "UFCW")

-and-

BUSINESS COUNCIL OF BRITISH COLUMBIA

(the "Business Council")

-and-

COALITION OF BC BUSINESSES

(the "Coalition")

PANEL: Frances R. Watters, Associate Chair (Adjudication)  
M.A. Hickling, Vice-Chair  
Laura Parkinson, Vice-Chair

APPEARANCES: Adam Albright, for Coca-Cola  
Catherine McCreary, for the Teamsters  
Shona Moore, Q.C., for the Federation  
David Blair, for the Steelworkers  
Don Bobert, for the UFCW  
Randy Kaardal, for the Business Council  
Andrea Zwack, for the Coalition

CASE NO.: 40316

DATE OF HEARING: April 5, 2000

DATE OF DECISION: July 12, 2001

## DECISION OF THE BOARD

### I. NATURE OF APPLICATION

1           The Teamsters apply under Section 141 of the *Labour Relations Code* (the "Code") seeking reconsideration of BCLRB No. B210/99. In that decision, the original panel found the Teamsters were not entitled under Section 65(3) of the Code to picket at a particular site when Coca-Cola was making a delivery to one of its customers.

2           This reconsideration application was filed when the labour dispute between the Teamsters and Coca-Cola was ongoing. That dispute has since settled. Notwithstanding that the underlying dispute had been resolved, we did not deny leave on the grounds that the issue was moot. The reconsideration application raised significant issues on the interpretation of the third and fourth criteria in Section 65(3) in the context of delivery work. Those criteria are whether the work is an "integral and substantial" part of the employer's operation, and whether the location where picketing is taking place is a "site or place of the lockout or strike". We considered this case to be one of the exceptions to the mootness doctrine given that the reconsideration process in Part 5 complaints can rarely be completed before the dispute settles: *East Kootenay Community Credit Union*, BCLRB No. B455/99. For that reason, a hearing was scheduled and intervention from others in the labour relations community was invited. Intervenor status was granted to the Business Council, the Coalition, and the Federation, as well as to two unions representing employees in delivery or distribution operations, the UFCW and the Steelworkers.

### II. BACKGROUND

3           The Teamsters are certified to represent employees "at and from" various locations of Coca-Cola in the Lower Mainland. Coca-Cola both manufactures its product and delivers it to various customers. It has approximately 2,500 customers and delivers to about 3,000 sites. It has 75 trucks that it uses for those deliveries.

4           During the course of the lockout in this dispute, Coca-Cola used management staff to deliver its product to its customers. The Union picketed when Coca-Cola delivered its product to one of its larger customers, Costco at its Richmond location.

5           Costco usually takes a full load with each delivery. From arrival to departure, each delivery at that location of Costco takes between one half and one hour, at least three times a week. Costco employees unload the product and reload the empty pallets. The time spent waiting by the Coca-Cola driver for either a vacant loading bay or for the loading process to be completed is paid time. After delivery, the Coca-Cola driver returns to Coca-Cola's warehouse to reload. No evidence was led on the amount of travel time involved in the trip to and from the Richmond location of Costco.

6 In argument before the original panel, the first two criteria of Section 65(3) were not at issue: the parties agreed that the site where picketing took place at Costco was a place of work under the direction and control of Coca-Cola.

7 In its analysis, the original panel compared the current language of Section 65(3) with its focus on where work is performed, to the language found in the former legislation. The original panel found that the reconsideration panel's decision in *Slade & Stewart*, BCLRB No. B317/84, (1984) 7 CLRBR (NS) 258 ("*Slade & Stewart No. 1*") was not determinative as it was decided before the current language in Section 65(3) came into effect.

8 The original panel held that the third criterion in Section 65(3) was not met. The original panel considered that the delivery to one customer location out of the total complement of 2,500 customers was not substantial within the context of Coca-Cola's operations as a whole. As the original panel characterized it, the nature of Coca-Cola's business is the production of the product and the transportation of the product to a customer, not the unloading of the product by the customer's personnel. The original panel noted that the work performed by the driver at the site was not considerable as a significant portion of the time was spent waiting by the driver for others to perform their job duties or for a loading bay to become available. Although acknowledging that the driver was paid for waiting time, the original panel found that work was not an integral and substantial part of Coca-Cola's operation.

9 On the fourth criterion, the original panel found that while the driver delivers to Costco on a "regular" basis, the employee does not perform a "considerable" amount of work at the location and is only there for approximately three hours out of an average work week of 50 hours. A significant portion of that time is spent waiting by the driver. The original panel found there was not an "enduring connection" between Coca-Cola's operations and the third party customer site, the Richmond Costco.

### III. POSITIONS OF PARTIES

#### (a) Teamsters

10 The Teamsters assert the right to picket at Costco only while a management driver from Coca-Cola is making deliveries; it is not claiming the right to picket on an ongoing basis after that driver has left. It notes that the Board has previously recognized such an entitlement to picket while deliveries are made: *Rothman's*, BCLRB No. 284/86; *Core-Mark Distributors*, BCLRB No. 24/87.

11 On the third criterion, the Teamsters argue that the original panel asked the wrong question by making the assessment relative to the particular customer rather than considering the significance of delivery generally to the overall enterprise of the employer. In its view, the Board should not divide up the employer's business by focussing on the work for a particular customer, but should look instead at the significance of the overall delivery function. The analysis should also be focussed on

whether the work is integral and substantial to the employer's operation, not whether it forms an integral and substantial part of a particular employee's duties.

12 On the fourth criterion, the Teamsters maintain that the analysis in *Slade & Stewart No. 1* is still valid, although decided under the previous legislation. The original panel overlooked the fact that the current picketing provision still uses the almost equivalent language of "site or place of the strike or lockout" considered in *Slade & Stewart No. 1*. That language was interpreted as not imposing any requirement for a significant or substantial amount of work at a location in order for it to be a site or place of a strike or lockout. Since *Slade & Stewart No. 1*, the threshold test for picketing is whether the presence is more than "fleeting and fortuitous": *Board of School Trustees of School District No. 47 (Powell River)*, BCLRB No. B105/93, at p. 4.

13 The Teamsters argue that if there is a concern on the part of Costco about the picketing, Costco could bring an application for relief under the common site picketing provision. The Board should not import concerns of harm to third parties into the Section 65(3) analysis, where relief can be obtained through the common site picketing provisions.

(b) Union-Side Intervenors

14 The Federation argues that the original panel erred in its analysis of the third criterion by focussing on the particular work performed in the delivery to a single customer rather than considering the significance of product delivery in general. The Federation submits that the original panel erred in excluding the time spent waiting for others to unload; it asserts that maintaining and securing a vehicle and its pallets is an integral part of any transportation business. The Federation says that in this case delivery work to customers is not "fleeting or fortuitous"; the transportation of product is a permanent, on-going activity within the context of the whole of Coca-Cola's operation.

15 On the fourth criterion, the Federation takes the position that a delivery truck is a "site" or "place" when it is stationary, and would be so at all times, but for the fact that third parties cannot do business with it while it is in transit.

16 The Steelworkers maintain that the correct test for the third criterion permits picketing at all places where employees work and that right is not lost merely because employees are mobile. It says that delivery employees may picket delivery sites without restraint regardless of the number of deliveries made per shift. The Steelworkers argue that the original panel wrongfully read in the phrase "at the location" into the third criterion. More properly, the focus should be on whether the work is integral and substantial to the employer in dispute, not the location. It also says the test is whether the work is "not ancillary". In its view, the original panel wrongfully parsed delivery work into warehouse, transportation and delivery elements in making its assessment of whether the work was integral and substantial.

17 The Steelworkers also maintain that the original panel erred in its analysis by reading the third criterion into the fourth criterion. It asserts that the meaning of the

fourth criterion was decided in *Slade & Stewart No. 1* as having no quantitative requirement.

18 The Steelworkers also argue that the court authority relied on by the Coalition to establish that a delivery truck is not a site or place of a strike or lockout has not been followed or has been readily distinguished: *BC Radio Cabs Ltd. v. Vancouver and District Taxi-Cab Drivers and Dispatchers Union Local 1599* (1964), 47 WWR 388 (BCSC); *Stock Exchange Building Corp. v. Federation of Telephone Workers* (1969), 70 WWR 150 (BCSC); and *MacMillan Bloedel v. International Brotherhood of Pulp, Sulphite and Paper Mill Workers* (1970), 70 CLLC ¶14,048.

19 UFCW says the position of the Employer-side intervenors on the extent of protection claimed for third parties wrongfully imports common site considerations into primary site picketing. It says the focus under the current legislation is not on the protection of third parties, but on where the employees work and the degree of their attachment to the site where the work is done. UFCW argues that the legislation is not intended to remove completely the right to picket where deliveries are made.

(c) Coca-Cola

20 Coca-Cola asserts that, in challenging the original panel's conclusion that the work performed at the Costco location is not an integral and substantial part of the employer's operation with an "enduring connection", the Teamsters seek to overturn a finding of fact. Coca-Cola argues that it is not the role of reconsideration panels to disturb findings of fact.

21 Coca-Cola further argues that *Slade & Stewart No. 1* was overturned by legislative amendment in 1987. In its view, the original panel properly construed the test under the current legislation. Coca-Cola argues that if the Teamsters' "global" approach to the third criterion were to be accepted, the Teamsters would be free to picket any of Coca-Cola's 2,500 customers. That result would not be a balanced approach to the struggle for economic power in a labour dispute and could not have been the intent of the legislation. Coca-Cola submits that the Board has never interpreted Section 65(3) in the manner suggested by the Union-side intervenors, and that there is no necessity to read the words "at the location" into the subsection as suggested by the Steelworkers. It argues that a proper interpretation of Section 65(3) makes it clear that the "work" in question is performed at the location.

22 As for the fourth criterion, Coca-Cola argues that the Board's post-1987 jurisprudence does require a "considerable" amount of work to be performed on a regular basis at the location: *Richmond Bagel Bakery (1987) Ltd.*, IRC No. C262/89; *Annacis Auto Terminals Ltd.*, IRC No. C263/89. It also refers to the 1992 report of the Sub-Committee of Special Advisors on Recommendations for Labour Law Reform as illustrating that the Legislature did not intend that there would be picketing possible at every customer location. In that report, the Special Advisors agreed that neutral employers who share a common site with a struck or locked out operation should be insulated from the effects of picketing (although there was some disagreement on the

manner in which the Board ought to exercise its discretion to insulate neutral employers at common sites).

(d) Employer-Side Intervenors

23 The Business Council argues that the original panel applied the correct test. Since 1987, the Board and the Industrial Relations Council have looked at the quality and quantity of work performed at a site by the employee to determine whether it is integral and substantial. As the Special Advisers' Report indicates, protection of neutral third parties from picketing was one of the compromises reached as part of the trade-off for the ban on the use of replacement workers. To accede to the arguments of the Union-side intervenors would be a significant shift in picketing law with no legislative mandate to do so. The legislation does not provide picketing rights for all operations of an employer where employees perform work; there is a limitation inherent in the provision which requires the Board to balance the competing interests reflected in the statute.

24 The Business Council asserts that the original panel's decision is consistent with the purposes of the Code and that to overrule the decision would be to increase greatly the scope of secondary picketing. The Business Council argues that the Union-side intervenors' reliance on the *Slade & Stewart* line of authority is misplaced given that the legislation has since been amended to focus on where the work is performed. It maintains that the original panel's decision in *Slade & Stewart No. 1*, BCLRB No. 265/84 is of assistance in deciding the third criterion of whether the work is an integral and substantial part of the employer's operation. It criticizes the Steelworkers' argument on this issue as amounting to read in the words "of that type" into the phrase "if the work is integral and substantial".

25 The Coalition joins with Coca-Cola in arguing that the reconsideration application represents an attempt to set aside factual findings of the original panel. The original decision rests upon a finding of fact, or at best a conclusion of mixed fact and law, as to whether the work was integral and sufficient in terms of amount and frequency to create an "enduring connection" between the particular location and the employer's operation. The Coalition also argues that the positions espoused by the Union-side intervenors would mean that the third and fourth criteria for picketing under Section 65(3) would be effectively negated. One of the Section 2 purposes of minimizing the harmful effects of labour disputes on uninvolved third parties would not be met as delivery trucks would be subject to picketing at any stop.

26 On the third criterion, the Coalition criticizes the Teamsters' adoption of the "fleeting and fortuitous" test as minimizing the requirements of "integral and substantial". The Coalition argues that "substantial" has an additional meaning to "integral"; it imparts a quantitative assessment whereas "integral" suggests a qualitative assessment. The Coalition argues that a substantial connection does not exist when all that is happening is a delivery.

27 The Coalition challenges the Teamsters' position limiting its right to picketing to the times the delivery truck is present at the customer's location. It argues that there is no temporal qualification in Section 65 and there is either a right to picket all the time, or there is no right to picket.

28 In answer to the argument of the Union-side intervenors that impact on third parties should not be considered in determining the sites of permissible picketing under Section 65(3), the Coalition argues that the purpose of Section 2(1)(c) is to minimize the effects of labour disputes on third parties and applies to all provisions of the Code, including the picketing provisions. The broader the definition given to primary site picketing, the greater the impact on third parties. The Coalition argues that a customer of a struck employer remains a neutral party entitled to protection, unless and until it becomes an ally by changing its operation to assist the employer.

29 The Coalition notes that the arguments of the Union-side intervenors on the fourth criterion are premised on the delivery truck being a site or place of the strike or lockout. It points out that a delivery truck has been found by the courts not to be a "place of business, operations or employment" of an employer: *Williams v. Local 212, Amalgamated Meat Cutters & Butcher Workmen of North America*, (1963), 44 W.W.R. 458 (BCSC). It further argues that the question is not whether the truck is a site or place of lawful strike or lockout, but whether the customer's place of business is.

#### IV. STATUTORY PROVISIONS

30 The history of legislative amendments to the picketing provisions offers assistance in interpretation of the provision before us. We, therefore, set out the various statutory provisions as they have evolved over the years. Section 3 of the *Trade-unions Act*, R.S.B.C. 1960, c. 384 defined the right to picket in these terms:

3(1) Where there is a strike that is not illegal under the *Labour Relations Act* or a lockout, a trade union, members of which are on strike or locked out, and anyone authorized by the trade union may, *at the employer's place of business, operations, or employment*, and without acts that are otherwise unlawful, persuade or endeavour to persuade anyone not to enter...(emphasis added)

31 When the *Labour Code* was introduced in 1973, the scope of permissible picketing was expanded to places which were not owned or controlled by the employer. Section 85 of the *Labour Code*, S.B.C. 1973, c. 122 provided:

(1) A trade union, a member or members of which are lawfully on strike, or locked out, or any person authorized by the trade union, may picket, as the word is defined in this Act, at or near

(a) the *site or place of the lockout or lawful strike*;

(b) *all other sites or places of business, operations or employment or the employer, including*

(i) *any place where an employee of that employer is carrying on business of that employer, whether the place is owned or controlled by the employer or not; and*

(ii) *any place that the employer operates or where the employer does anything forming part of the operation of his business; and*

(c) the place of business, operations, or employment of an ally of the employer. (emphasis added)

32 The picketing provisions were amended in 1984. Section 85(3) of the *Labour Code*, S.B.C. 1984, c. 24, the legislation in place at the time *Slade & Stewart* was decided, read as follows:

(3) A trade union, a member or members of which are lawfully on strike or locked out, or a person authorized by the trade union, may picket at or near a *site or place where a member of the trade union is locked out or lawfully on strike*. (emphasis added)

33 The picketing provisions were once again repealed and replaced in 1987 by the *Industrial Relations Reform Act, 1987*, S.B.C. 1987, c. 24. The 1987 amendments continued the shift from a legislative scheme that allowed a union and its members the right to picket the entire operations of an employer to a more restricted right to picket places where employees work. Section 65(3) of the current *Labour Relations Code* has identical language to the earlier provision with some additions. Section 65(3) reads as follows:

(3) A trade union, a member or members of which are lawfully on strike or locked out, or a person authorized by the trade union, may picket at or near a site or place where a member of the trade union performs work under the control or direction of the employer if the work is an integral and substantial part of the employer's operation and the site or place is a site or place of the lawful strike or lockout.

## V. ANALYSIS

### (a) Scope of Issues under Reconsideration

34 Before turning to the issues raised by this reconsideration application, we make this observation on what we need not decide in this case. We do not need to answer the question of picketing while a delivery vehicle is in transit. The facts presented to the original panel dealt only with picketing by the Teamsters at Costco while Coca-Cola's truck remained at the site. In argument on reconsideration, the Teamsters expressly asserted the right to picket only while the delivery was occurring. It did not seek the right to picket the truck in transit or to picket at Costco absent the presence of the delivery truck from Coca-Cola.

35 Given the position taken by the Teamsters, we are not required to consider the issue of picketing of delivery trucks while in transit or after the delivery trucks have left. We only need to decide the more limited, albeit important, question of the right to picket at the locations and during the time deliveries take places; i.e., during the period the truck is waiting to unload and unloading. Although it is unnecessary for us to consider the other issues further, we note that the Teamsters' position limiting the scope of its picketing to the time and place of delivery is supported by the outcome of the *Slade & Stewart* line of cases, and in particular, the judicial review decision: *Slade & Stewart Ltd. v. Retail Wholesale Union, Local 580*, [1984] B.C.J. No. 427. In *Slade & Stewart No. 1*, the reconsideration panel found that a delivery truck in transit was not a site of permissible picketing. The Board in a companion case released after *Slade & Stewart No. 1* ruled further that customer's premises were not a "site or place" of permissible picketing during those periods when no deliveries were being made: *Slade & Stewart*, BCLRB No. 64/85 ("*Slade & Stewart No. 2*").

36 In stating the limited scope of the issues under review, we also emphasize that we are considering the issue of entitlement to picket at the Section 65(3) stage without regard to the potential for regulation of that picketing through Section 65(7). Under that provision, the impact on potential third parties can be addressed by offering relief where there is common site picketing.

37 We preface our analysis of Section 65(3) by making the obvious observation that any right to picket that may exist under that provision may be restricted through common site picketing relief. Although there may be a right to picket at the definition stage of Section 65(3), the exercise of that right may be diluted at the regulation stage if third party interests are affected. Upon application, the Board will regulate the exertion of any secondary pressure on uninvolved third parties at a common site under Section 65(7). At that stage the Board attempts to weigh the competing rights of the striking or locked out employees to picket against the rights of third parties to be protected from the effects of a labour dispute. Under the interpretive and policy framework governing common site applications set out in *Sovereign General Insurance Co.*, BCLRB No. B451/94 (Leave for Reconsideration of BCLRB No. 275/94), (1995), 25 CLRBR (2d) 161), the Board may reconcile the competing interests by imposing geographical, temporal or functional limitations, such as conditions imposed on the location of pickets, the timing when pickets may be present and restrictions on the type of work performed.

(b) Integral and Substantial Test

38 We begin our analysis with consideration of the third criterion which requires the work to be "an integral and substantial part of the employer's operation". In this case, the dispute arising under the third criterion is over both the vantage point from which the significance of the work should be assessed and the significance to be attributed to waiting time as part of the task of delivery.

39 The first interpretive issue we must decide is from which perspective should the assessment of the integral and substantial nature of the work be done? Should the Board look only at the work at the location where picketing is taking place (an approach

seemingly adopted by the original panel)? Or, should the Board look more broadly at the significance of that work to the employer's undertaking as a whole (an approach advocated by the Union-side parties)?

40 To answer that issue, we look to the history of the "integral and substantial" test with its origins in *Slade & Stewart No. 1*. In the following passage, the reconsideration panel in *Slade & Stewart No. 1* rejected an argument that there must be a significant or substantial amount of work performed at a location in order for it to be a "site or place":

Having regard to the words used in Section 85(3) and (4) of the Labour Code, considered in the context of the statute as a whole, we can see no basis for requiring that a significant or substantial amount of work must be performed *at a location* in order for it to be found to a "site or place where a member of the trade union is locked out or lawfully on strike". (at p. 11 – emphasis added)

41 After *Slade & Stewart No. 1* was decided, the Legislature responded by seemingly adopting part of the test advocated by the original panel in *Slade & Stewart No. 1*, but rejected by the reconsideration panel. The Legislature imported the substantial and integral elements into the provision. However, rather than making the assessment relative to a particular location, it expressly made it relative to the "employer's operation". To accept the interpretation advanced by the Employer-side parties that the focus should solely be on the work performed at the location would require us to read words into the phrase that are not there. It would require that the "work performed *at the location*" be integral and substantial. That outcome would not be faithful to the language of Section 65(3) which ties the integral and substantial requirement of the work to "the employer's operation". We prefer the alternative interpretation that fixes the assessment relative to the operations as a whole.

42 We find that this analytical approach to the language is consistent with the intent of the picketing amendments. As stated, the trend of the amendments to the picketing legislation has been a shift of focus from an employer's place of business to the place of work with the right to picket tied to the presence of work. We note that if the interpretation advocated by the Employer-side parties were to prevail, there could be scenarios where there may be no sites at all where employees could picket even if they work at those sites. There may well be instances where the employer's only business is delivery and the customer's premises are the employees' only work sites. One example of such a scenario is a bicycle courier service in which employees do pick-ups and deliveries exclusively from customers' locations and have no physical presence at their employer's dispatch office. If the assessment of "integral and substantial" were to be made relative to the location of the pick-up or delivery, it is unlikely there would be any right to picket in that instance as the employee may only spend minutes at each location to do a pick-up or delivery. To accept the Employer-side parties' argument would be to preclude any meaningful right to picket anywhere in that type of case.

43 Although we were not called upon to consider the *Charter of Rights and Freedoms*, the recognition by the Supreme Court of Canada in *United Food and*

*Commercial Workers' Union, Local 1518 v. Kmart of Canada Ltd.* (1999), 176 DLR (4<sup>th</sup>) 607 [1999] 2 SCR 1083 of the constitutional value of freedom of expression is one reason why we prefer one interpretation over another so as to afford some forum for expressive activity, rather than none.

44 As the bicycle courier example illustrates, it is easier to articulate and apply picketing rules when dealing with the typical industrial model where there are fixed work places, rather than mobile employees. Delivery presents a harder case as there is more difficulty in giving meaning to "integral and substantial" in the delivery context where an employee's presence at a site may be brief and irregular. The delivery cases pose a challenge. We are faced with a choice between two alternative interpretations – one which under the scenario just described affords a right to picket where work is conducted, and another where no picketing is permitted at any place where work is conducted, even when that work may form the core of the enterprise. Given the legislative policy choice expressed of tying the right to picket to the place of work, we favour the second alternative to allow some picketing where work occurs, rather than none.

45 From that review of the history of the provision, its language and the policy imperatives, we return to the issues in this case. We find that the significance of the delivery function in this case should properly be analyzed in the context of the employer's overall business as a whole. That analysis was the approach adopted in *Lafarge Canada Inc.*, IRC No. C156/88 and is one which we endorse. The Council in *Lafarge* found that the focus of the third criterion is on the nature of the employer's operation and the significance of the work performed by members of the union to that operation (at p. 10). That analysis points to the need to identify at the outset the nature of the employer's operation. Once the type of business is defined, then the significance of the work performed by the employees to that operation can be assessed. However, the question is asked in relation to the context of the employer's operations, not in relation to the location of the individual customer.

46 We consider the original panel used too narrow an approach when defining the nature of Coca-Cola's operation. It first identified the employer's operation as the "business of bottling and transporting Coke to its customers" (at para. 30). However, it proceeded later in its analysis to minimize the significance of the unloading function in the delivery process even though the driver was present throughout. It excluded the unloading of the product by the customers' staff from the transportation aspect of the employer's business.

47 The test of "integral and substantial" should not be assessed by looking at a single delivery to one customer location or even one customer alone or by looking at the particular task in isolation. As the panel observed in *Ocean Fisheries Ltd.*, IRC No. C167/89, the inquiry should not be into whether the work is an integral and substantial part of an individual employee's duties. The Board in that case questioned the utility of drawing lines of demarcation between various duties performed at different locations, and instead characterized the delivery in that case as the culmination of the "employment process" (at p. 11). We find that analysis to be persuasive. Applying that

approach in this case, we consider that unloading is the culmination of the delivery process. On the facts of this case, the delivery process as a whole is an integral part of Coca-Cola's transportation of its product.

48 As well as focussing on the particular task done at the location, the original panel made its assessment of whether the work was "substantial" by referring to the total number of customers served by Coca-Cola. It stated that the "delivery to one customer out of 2,500 customers is not substantial within the context of the Employer's operation as a whole" (at para. 32). We conclude that the original panel erred in focussing on the particular work performed at a site of a single customer. That analysis is not consistent with the language of the provision which expressly directs that the assessment of integral and substantial be done in relation to the employer's operation. The original panel should have assessed the significance of delivery of the product generally, rather than the significance of delivery to the particular customer, or customer location.

49 If the focus were on the location of the particular customer rather than the delivery function as a whole, other anomalous results may follow. If an employer's business had only a small number of customers, under the original panel's analysis of the third criterion, there may be a right to picket because of the importance of the customer and the frequency of the delivery. By contrast, if the delivery business consisted of many deliveries, brief in duration, to a large variety of customers, the importance of the delivery at each location would lessen and the right to picket may not arise. We do not favour an interpretation that would result in such an anomaly.

50 We turn to the second issue under the third criterion in Section 65(3); that is the significance of the time spent waiting by a driver while others do the unloading. The original panel observed that a "significant portion of time is waiting for someone else to perform their job duties" (at para. 30). Although the original panel did acknowledge that time spent waiting was paid time for the driver, it found that waiting time was not an "integral and substantial" part of Coca-Cola's operation. The Teamsters quarrel with the significance attached by the original panel to the fact that the employees wait for others to perform the unloading. They say that unloading is part of the transportation of the product and it is artificial to break down the delivery function into particular tasks and separate out waiting time from the rest of the delivery work.

51 The original panel relies on the fact that drivers wait for an empty loading bay and rely on others to unload the product to say, in effect, that such work is of lesser importance. We think the focus on the character of the work as waiting time is misplaced; the question is rather whether it is, in fact, work. There was no dispute in this case that waiting time was part of the employees' delivery job and was paid time. Delivery of the product to a customer is "work", regardless of whether the work entails waiting while others unload, or actively doing the unloading.

52 We find that the original panel erred in its analysis of the "integral and substantial" nature of the work and that this error in analysis affected its characterization of the work. The Employer-side parties argue that to set aside the original panel's conclusions that the work is neither substantial nor integral would be to interfere with a

finding of fact. We do not accept their assertion that these findings are solely factual matters; we consider these findings are instead matters of mixed fact and law. As a reconsideration panel, we accept the factual findings of the original panel as to the frequency of the deliveries, the type of work performed and the amount of time spent. On the basis of those facts as found by the original panel, we find that the original panel erred in concluding that delivery work was not integral and substantial when that work had a "permanent ongoing presence within the context of the employer's operation": *Lafarge, supra*, at p. 10. Delivery of Coca-Cola's product is not within the category of the excluded "special service" or chance event; it is an essential part of its operation and is regularly done: *cf. Molstar Inc.*, BCLRB No. B287/97, at paras. 16 - 18.

(c) Site or Place of Lawful Strike or Lockout

53 Our finding that the original panel erred in its analysis of the third criterion requires us to consider the fourth criterion under Section 65(3) that the place of picketing be a "site or place of the lawful strike or lockout". This last criterion has caused difficulties in interpretation in the past and has been described as an "enigmatic requirement": *Ocean Fisheries, supra*, at p. 11. In a search for some distinctive meaning, panels have struggled with how to give independent content to the fourth criterion. In *Richmond Bagel, supra*, the Council observed that it would be improbable that the Legislature would stipulate four requirements if in all cases the fourth requirement would be met by satisfying the first three. The panel then articulated its view of the meaning for the fourth criterion as a place where the employees perform "considerable work on a regular basis so that an enduring connection to the employer's operation is established" (at p. 19).

54 That enduring connection test has been cited or followed by a number of original panels since *Richmond Bagel: International Warehousing & Distribution Ltd.*, IRC No. C137/91 (Reconsideration allowed in part, but other issues found to be academic: IRC No. C15/92); *Ocean Fisheries, supra*; and *Annacis Auto Terminals Ltd., supra*. However, as the Union-side parties argue, one problem with the enduring connection test and its requirement for "regularity" and "considerable work" is that it overlaps with the third criterion. The nature and degree of work is already built into the third criterion, with the phrase "integral" including some qualitative aspects of degree and regularity, and the phrase "substantial" connoting a quantitative element.

55 Apart from the overlap with the third criterion, a further difficulty with the enduring connection test is that the fourth criterion on its face is not so qualified. To accept the "enduring connection" test introduces an added element to the phrase when it is not on its face so modified. To follow this approach requires reading into the fourth criterion language that is not there.

56 It is noteworthy that the predecessor to Section 65(3) was not interpreted as having any such qualitative or quantitative component. Almost identical language to that found in the fourth criterion was considered in *Slade and Stewart No. 1*. The picketing provision then in place allowed picketing "at or near a site where a member of the trade union is locked out or lawfully on strike". The argument advanced before the

reconsideration panel in *Slade & Stewart No. 1* was that this language should be interpreted as requiring a significant or substantial amount of work to be performed at a location before it could qualify as a site for permissible picketing. The reconsideration panel rejected that argument stating that it could "see no basis for requiring that a significant or substantial amount of work must be performed at a location in order for it to be found to be a 'site or place where a member of the trade union is locked out or lawfully on strike'" (at p. 11). It found that there was no quantitative or qualitative assessment implied in that language and that the presence of a minimal amount of work establishes a location as a site or place.

57 That same language considered in *Slade & Stewart No. 1* is repeated in the fourth criterion of the current Section 65(3) of "site or place of a lawful strike or lockout". On its face, the current language of 65(3) has no quantitative or qualitative element in the fourth criterion. That earlier interpretation of equivalent language in *Slade & Stewart No. 1* brings into question the correctness of the enduring connection test with its focus on permanence, regularity and substantial work. That added gloss is not faithful to the language of Section 65(3).

58 The difficulty that has been experienced by past panels in finding independent meaning for the fourth criterion may be the result of the fact that the right meaning has not been given to the first criterion. The meaning of the fourth criterion may be more readily apparent when the language is considered in its historical setting. As the historical overview above reveals, the focus of the earlier picketing legislation was previously on the employer's operation and business. Under the old legislation, a union did not need to establish any employment tie with a site in order to be able to picket that location. Now with the first criterion, the site where picketing occurs must be a place where an employee performs work. Inclusion of this requirement of work was to clarify that there was no right to picket a place just because it is a site of the employer's business.

59 In our view, the fourth criterion of a "site or place of lawful strike or lockout" is designed to establish a "but for" test; i.e., but for the strike or lockout, employees would be working there. That interpretation is consistent with the approach in *Slade & Stewart No. 1* where the reconsideration panel interpreting equivalent language observed that the employees had "ceased to perform work [at that site] because of a lockout" (at p. 13). The "but for" test was also used in *District of Sparwood*, BCLRB No. B282/84, (1985), 7 CLRBR (NS) 106, where the Board allowed picketing at one location as it was "an area at which, but for the strike, members of the union would work from time to time" (at p. 9).

60 Although the "but for" test has been placed in some cases in the first criterion in Section 65(3), we believe that the true purpose of the first element is to ensure that employees work there. Its focus is the place of work. Its inclusion is to clarify that there is no right to picket just because it is a site of an employer's business; actual work by the employees at that location is required before there is any right to picket.

61 The alternate interpretation we pose for the fourth criterion as establishing a "but for" test is more consistent with the history of the language. The other benefit of our interpretation of the fourth criterion is that it gives independent meaning to every phrase. It accords with the statutory rule of construction that separate provisions are intended to have distinct meaning: *Driedger on the Construction of Statutes*, Third Edition, 1994, at pp. 159 – 161.

62 We acknowledge the argument of the Business Council that to accede to the position of the Union-side intervenors on the interpretation of Section 65(3) would be an apparent shift in policy without any express legislative mandate to signal a direction for change. We also recognize that the "enduring connection" test first articulated in *Richmond Bagel* has been in place for some time and seemingly implicitly endorsed by the Legislature which has not intervened over the years to alter the picketing provisions despite the opportunity to do so. However, this interpretive issue has never been squarely raised. The interpretation of the fourth criterion is not a matter that has been reviewed in a reconsideration application, a fact perhaps explainable given the timing of some of the decisions relative to the settlement of the underlying dispute.

63 Given that these issues have never been decided at the reconsideration level, we do not consider the state of the law to be as "settled" as was made out in argument. When issues relating to the interpretation of the picketing provisions did arise in the past, earlier reconsideration panels of the Council declined to intervene on the grounds of mootness: *Ocean Fisheries*, IRC No. C21/90; *International Warehousing*, IRC No. C15/92. In those cases, the Council acknowledged the "blemishes in a body of law at the development stage" and stated its preference for case-by-case development of law rather than abstract pronouncements by a reconsideration panel. In declining to intervene, the reconsideration panel in *Ocean Fisheries* commented that it "was not as if there was a substantial body of jurisprudence which has been followed for years and is now being challenged and must be looked at again with fresh eyes". It referred to the possibility of the issue resurfacing as another reason not to uphold or overturn the original decision and indicated its preference to allow maximum flexibility to the parties to argue their cases in the "literally limitless spectrum of facts" that may arise (at pp. 7 - 8). It also stated that any social cost in uncertainty in the interpretation of the criteria in the picketing provision is outweighed by the advantages of allowing more debate on this issue in future cases. Given those statements, we do not accept the argument that there is a well-established line of jurisprudence. The present case is one of the rare instances since then where picketing issues have been considered at the reconsideration level.

64 In short, we find a right to picket where, but for the strike or lockout, the employees would work at a location, provided the work is under the control and direction of the employer and is integral and substantial to the employer's operation. Although we have found that the original panel erred in concluding that picketing was not permitted in this case, our decision should not be construed to mean that a right to picket is established every time a delivery truck makes a delivery. The outcome will depend on the nature of the operations and whether delivery forms an integral and substantial part of that employer's operation.

65 Although we offer that last caveat, we also appreciate the need for certainty in the picketing rules. It is clearly in the best interests of both sides of the labour community that the criteria are straightforward and easily understood so that there can be a minimum of doubt and uncertainty over where picketing may take place. We earlier observed that the application of the picketing rules is more obvious in the usual industrial setting where an employer has a principal base of operations, such as a factory or warehouse. As this case illustrates, their application becomes more challenging when employees are mobile and their work is dispersed over a number of locations.

VI. CONCLUSION

66 For the reasons set out above, we grant leave for reconsideration and set aside the original decision.

LABOUR RELATIONS BOARD

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